Filed 1/29/19 Alhidir v. Loa Angles Community College District

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WAIL ALHIDIR, Plaintiff and Appellant, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Defendant and Respondent.	B284635 (Los Angeles County Super. Ct. No. BC614663)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Barbosa Group and Patricia Barbosa for Plaintiff and Appellant.

Musick, Peeler & Garrett, Jesse D. Marr, Kayla Birns and Stuart W. Rudnick for Defendant and Respondent.

Plaintiff and appellant Wail Alhidir, a blind student enrolled at Los Angeles City College (LACC), a community college within the Los Angeles Community College District (respondent), filed a complaint against respondent alleging disability discrimination under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.), section 504 of the 1973 Rehabilitation Act (29 U.S.C. § 794 et seq.), and the Unruh Act (Civ. Code, § 51). His claims involved LACC's alleged failure to accommodate his disability in three areas: auxiliary classroom aids, emergency plans, and physical barriers. The trial court bifurcated appellant's equitable claim for injunctive relief from his request for damages. Following a bench trial, the trial court concluded that appellant's evidence failed to prove a failure of accommodation under the ADA, Rehabilitation Act, and Unruh Act, and entered judgment in favor of LACC. On appeal, appellant contends that the court erred in trying the equitable claim for injunctive relief first, and that the evidence does not support the court's verdict in favor of LACC. We disagree. Under settled law, it was within the trial court's discretion to try the equitable claims first. Further, under the applicable standard of review, the evidence supports the trial court's conclusion that appellant failed to meet his burden of proof. Therefore, we affirm.

PROCEDURAL BACKGROUND

We save our summary of the evidence for that part of our Discussion section, below, in which we consider appellant's contention

that the evidence does not support the trial court's decision. We begin with a procedural summary.

On March 22, 2016, appellant filed a complaint seeking declaratory relief, injunctive relief, and damages for disability discrimination under the ADA (42 U.S.C. § 12101 et seq.), Rehabilitation Act (29 U.S.C. § 794 et seq.), and Unruh Act (Civ. Code, § 51). Appellant alleged that respondent failed to accommodate his impairment and failed to make reasonable modifications for him. His prayer for injunctive relief asked the court to order respondent to provide accommodations that included the following: a "qualified reader and note taker who consistently provide[s] competent accommodations for each of his classes"; "[a]lternative media resources and up-graded [*sic*] technology . . . equal to the resources offered to non-disabled students, including books, reference materials, and computer access on campus"; "[t]est taking accommodations . . . useable to and accessible by Plaintiff"; and "[w]ritten materials in an alternative format that include Braille formatted and/or computer accessible materials that are provided in a timely manner that is equal to that available to other students."

On March 27, 2017, at the final status conference, the trial court bifurcated the trial, ordering that it would hear the injunctive relief issues on April 10, 2017. Following appellant's presentation of evidence, respondent moved for judgment under Code of Civil Procedure section 631.8. The trial court took the motion under submission. Later, the court heard closing argument (without presentation of any evidence by respondent). The court then issued a Final Statement of Decision in

which the court concluded that appellant had failed to meet his burden of proof on his claims. The court stated that appellant's claims were based on three theories: denial of academic accommodations, lack of a sufficient emergency plan, and "architectural barriers." The trial court found that appellant provided "very minimal evidence of difficulties he had in his previously taken classes. In fact, when he requested accommodations, he admitted OSS was usually prompt in responding. Further, most of his now reported difficulties stem from plaintiff's own inaction and/or failure to notify the college that accommodations were not meeting his needs. Plaintiff's primary demand—a paid note taker—is not a legally required accommodation." The court further found that appellant failed to show that the school's emergency plan was unreasonable or "defective." As to physical barriers, the court found that appellant failed to show that he "was denied access to any specific area on the campus because of the presence of some barrier." Finally, the court found that the school is not a business establishment within the meaning of the Unruh Act. The court thus concluded that appellant was not entitled to injunctive relief. Because of its finding that respondent "is not liable for any violation of law," the court found that "no trial on the issue of damages would be proper." Further, based on its conclusions, the court found respondent's motion for judgment to be moot. The court entered judgment in favor of respondent. Appellant timely appealed.

DISCUSSION

I. *Trial on Equitable Issues First*

Appellant contends that the trial court erred in trying his equitable claims first and not allowing him to present his claims to a jury. The law is to the contrary. "'It is well established that, in a case involving both legal and equitable issues, the trial court may proceed to try the equitable issues first, without a jury. . . , and that if the court's determination of those issues is also dispositive of the legal issues, nothing further remains to be tried by a jury.' [Citations.] [¶] Indeed, reviewing courts have emphasized that the better practice for trial courts is to decide equitable issues first for the explicit reason that a jury trial on any legal issues may be avoided. 'Generally, in mixed actions, the equitable issues should be tried first by the court, either with or without an advisory jury. [Citations.] Trial courts are encouraged to apply this "equity first" rule because it promotes judicial economy by potentially obviating the need for a jury trial.' [Citations.]" (*Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal.App.5th 252, 355 (*Alcoa*).) "We would reverse a decision regarding the management of a case for trial and the order in which issues are to be tried only for a manifest abuse of discretion. [Citation.]" (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 763.) Appellant has failed to show that the court abused its discretion in trying the equitable issues first. The issues regarding whether appellant was entitled to injunctive relief were identical to those regarding LACC's potential liability for damages. In that situation, it was perfectly appropriate for the court to try the right to equitable relief

first, ultimately obviating the need for a jury trial. (*Alcoa*, *supra*, 12 Cal.App.5th at p. 355.) We proceed to consider whether appellant produced sufficient evidence to be entitled to relief.

II. *Sufficiency of the Evidence*

Appellant contends that the trial court's decision was not supported by the evidence. We observe that in terms of his evidentiary presentation, appellant's claims for accommodation can be broken down into three categories: auxiliary academic accommodations for his classes, accommodations for physical barriers on campus, and accommodations for emergency evacuation plans. After discussing the standard of review and the relevant legal principles for appellant's disability claims under the ADA, Rehabilitation Act, and Unruh Act, we discuss the evidence in each of the three categories presented by appellant's evidence, and explain why it was insufficient to meet appellant's burden of presenting a prima facie case of an unreasonable failure to accommodate.

A. *Standard of Review*

"'In general, in reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]" [Citation.]' [Citation.] 'We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment.

[Citation.]' [Citation.] The testimony of a single witness may be sufficient to constitute substantial evidence. [Citation.] On the other hand, '[q]uestions of statutory interpretation, and the applicability of a statutory standard to undisputed facts, present questions of law, which we review de novo. [Citation.]' [Citation.]" (*Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 969 (*Lui*).)[1]

B. *Relevant Legal Principles*

1. *ADA and Rehabilitation Act*

Appellant asserted claims under Title II of the ADA and section 504 of the Rehabilitation Act. As here relevant, the legal standards and requirements of the two acts are identical.[2]

---

[1] On appeal, appellant phrases his arguments as if the court had granted a motion for nonsuit, and he invokes the standard of review of such motions. However, a nonsuit motion applies only in jury trials, and the standard of review of the grant of a nonsuit motion (in which the court draws all inferences in plaintiff's favor) does not apply to the grant of a motion for judgment in a bench trial. Rather, the standard on appeal for review of a grant of a motion for judgment is the same as the standard of review in a trial in which evidence is presented by both sides—review is for substantial evidence. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.) In any event, here the trial court treated the case as having been fully tried, and issued a statement of decision, finding the motion for judgment moot.

[2] "[T]he standards applicable to one act are applicable to the other. Title II of the ADA was modeled after § 504 of the Rehabilitation Act; the elements of claims under the two provisions are nearly identical, and precedent under one statute typically applies to the other. [Citations.] The chief difference between the two statutes is that the

Title II of the ADA provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (42 U.S.C. § 12132.) In language very similar to the ADA, the Rehabilitation Act provides that "'[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.'" (*Gates v. Rowland* (9th Cir. 1994) 39 F.3d 1439, 1445.) "Both acts 'prohibit discrimination against qualified disabled individuals by requiring that they receive "reasonable accommodations" that permit them to have access to and take a meaningful part in . . . public accommodations.' [Citation.] . . . [¶] In the education context, the ADA and the Rehabilitation Act require a covered institution to offer reasonable accommodations for a student's known disability unless the accommodation would impose an 'undue hardship' on the operation of its program, [citations], or "'fundamentally alter the nature of the service, program, or activity,'" [citations]. Thus, while a covered entity 'must make "reasonable accommodations," it does

---

Rehabilitation Act applies only to entities receiving federal funding, while Title II of the ADA contains no such limitation." (*Washington v. Indiana High School Athletic Assn.* (7th Cir. 1999) 181 F.3d 840, 845, fn. 6.) "As the standards for actions under these provisions of the ADA and the Rehabilitation Act are generally equivalent, we analyze such claims together. [Citation.]" (*Dean v. University at Buffalo School of Medicine* (2d Cir. 2015) 804 F.3d 178, 187 (*Dean*).)

not have to provide a disabled individual with every accommodation he requests or the accommodation of his choice.' [Citations.]" (*Dean, supra,* 804 F.3d at pp. 186–187; see also *Argenyi v. Creighton University* (8th Cir. 2013) 703 F.3d 441, 448 (*Argenyi*) [although ADA and Rehabilitation Act are broad in scope, "they do not require institutions to provide all requested auxiliary aids and services," but only "'necessary' auxiliary aids and services to individuals with disabilities"].)

Implementing regulations of the ADA and Rehabilitation Act contain identical standards. ADA regulations require that "[a] public entity . . . make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." (28 C.F.R. § 35.130(b)(7)(i).) In addition, "[a] public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." (28 C.F.R. § 35.160, subd. (a)(1).) Further, "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity. [¶] (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the

individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability." (28 C.F.R. § 35.160, subd. (b)(1) & (2).)

Similarly, regulations implementing the Rehabilitation Act require an institution to "make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student." (34 C.F.R. § 104.44(a).) As to auxiliary aids, the school is required to "take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills. [¶] . . . Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature." (*Id.*, subd. (d).) Although "a college is

not responsible for providing [auxiliary aids] for personal use or study," "[i]t may be difficult . . . to draw the line between aids for personal use or study and those required to be provided. For example, where a blind student has a research assignment requiring reading beyond assigned textbooks, it would seem that a reader should be available to assist in reading those materials, although the college may not be required to provide a reader for the student who wishes to read supplementary (but not required) material noted in the textbook." (Rothstein, Disabilities and the Law (4th ed. 2018), § 3:10 Programs and services—Auxiliary services.)

Under both the ADA and the Rehabilitation Act, "'[t]he educational institution has a "real obligation . . . to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation."' [Citation.] Subsumed within this standard is the institution's duty to make itself aware of the nature of the student's disability; to explore alternatives for accommodating the student; and to exercise professional judgment in deciding whether the modifications under consideration would give the student the opportunity to complete the program without fundamentally or substantially modifying the school's standards. [Citations.]" (*Wong v. Regents of University of California* (9th Cir. 1999) 192 F.3d 807, 817-818 (*Wong*).)

In presenting a claim for failure to accommodate under the ADA and the Rehabilitation Act, the plaintiff "bears the 'initial burden of producing evidence' both that a reasonable accommodation exists and that this accommodation 'would enable [him] to meet the educational

institution's essential eligibility requirements.' [Citation.] Production of such evidence shifts the burden to the [school] to produce rebuttal evidence that either (1) the suggested accommodation is not reasonable (because it would substantially alter the academic program), or (2) that the student is not qualified (because even with the accommodation, the student could not meet the institution's academic standards). [Citation.]" (*Wong*, *supra*, 192 F.3d at pp. 816–817; see also *Novak v. Bd. of Trustees of S. Ill. Univ.* (7th Cir. 2015) 777 F.3d 966, 974 ["If the plaintiff can establish a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for any alleged adverse action toward the plaintiff. [Citation.]"].) "[B]ecause [appellant] bears the burden of establishing an ADA violation, []he must establish the existence of specific reasonable accommodations that [LACC] failed to provide. [Citations.]" (*Memmer v. Marin County Courts* (9th Cir. 1999) 169 F.3d 630, 633 (*Memmer*).) "[A]n academic institution can be expected to respond only to what it knows (or is chargeable with knowing). This means, as the Third Circuit has recently observed, that for a medical school 'to be liable under the Rehabilitation Act, [it] must know or be reasonably expected to know of [a student's] handicap.' [Citation.] A relevant aspect of this inquiry is whether the student ever put the medical school on notice of his handicap by making 'a sufficiently direct and specific request for special accommodations.' [Citation.] Thus, we must view the reasonableness of [LACC's] accommodations against the backdrop of what [LACC] knew about [appellant's] needs while he was enrolled there." (*Wynne v. Tufts University School of Medicine* (1992) 976 F.2d 791, 795 (*Wynne*).)

2. *Unruh Act*

Appellant also brought claims under the Unruh Act. The viability of those claims depended on his ability to prove violations of the ADA and Rehabilitation Act.[3]

"The Unruh Civil Rights Act broadly outlaws arbitrary discrimination in public accommodations and includes disability as one among many prohibited bases. [Citation.]" (*Jankey v. Lee* (2012) 55 Cal.4th 1038, 1044.) The statute provides in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) "Subdivision (f) of section 51 provides that '[a] violation of the right of any individual' under the ADA is also a violation of section 51." (*Munson v. Del Taco, Inc.* (2009) 46

---

[3] The trial court concluded that a public school such as LACC is not a business establishment within the meaning of the Unruh Act. On appeal, appellant challenges this ruling. However, we decline to consider the contention, because our conclusion that appellant failed to prove a violation of the ADA and Rehabilitation Act also defeats his Unruh Act claims. Thus, we need not consider whether the trial court correctly concluded that LACC is not a business establishment. Rather, for purposes of our discussion, we simply assume (without deciding) that the Unruh Act covers LACC.

Cal.4th 661, 670.) The purpose of this subdivision is to "'provid[e] persons injured by a violation of the ADA with the remedies provided by the Unruh Act,'" including a "'right of private action for damages.'" (*Id.* at p. 672.) However, "'"[b]ecause the Unruh Act has adopted the full expanse of the ADA, it must follow, that the same standards for liability apply under both Acts."' [Citation.]" (*Ibid.*)

C. *Auxiliary Classroom Aids*

We begin our analysis of the evidence with the evidence relating to the alleged failure to provide auxiliary classroom accommodations. Because appellant is blind, he is a qualified individual with a disability. However, for the reasons discussed below, drawing all inferences in favor of the trial court's decision (*Lui*, *supra*, 211 Cal.App.4th at p. 969), we conclude that appellant failed to make the required prima facie showing that LACC failed to provide reasonable auxiliary education accommodations for his classes. (*Wong*, *supra*, 192 F.3d at p. 817.)

1. *Fall 2013 and Spring 2014*

Although appellant began attending LACC in the fall of 2013, at trial he raised no issue with respect to accommodations for classes he took that semester or in the next semester, spring of 2014. Nonetheless, evidence of those semesters is relevant to his claims regarding later semesters.

In fall 2013, appellant completed two classes, Communications 101, in which he received an A, and Philosophy 1, in which he received

a B.[4] He registered at the school's Office of Special Services (OSS), which provides services for disabled students. OSS uses an Academic Accommodations Authorization form, which is discussed with the student, to determine what specific accommodations will be granted for each course. The form, which is filled out by OSS, has a list of potential accommodations. One category of accommodations is "Test Taking Accommodations," under which, next to boxes to be checked, are a list of potential accommodations. Similarly, a second category, "Classroom Accommodations," has a list of potential accommodations, next to boxes to be checked.

Appellant testified that OSS protocol required him to obtain an authorization form from the OSS counselor for every class and give it to each professor. He was advised that he should go to the OSS office to request the form in the first two weeks of the semester. He did not receive the academic accommodations authorization form in an accessible format. Rather, according to appellant, the OSS counselor read the form to him, but not the form in its entirety, and had him sign it. Appellant testified that he was never told that a note taker was an accommodation he could request.

Beginning in fall 2013, appellant received the following test taking accommodations: double time to take exams, assistive technology on campus (a screen reader, word processor, and lap top), and "scantron" assistance (meaning that for multiple choice exams appellant would

---

[4] Because his class load was too heavy, he withdrew from two other classes that semester.

take his exam on a computer at OSS and would indicate which option was his answer; based on appellant's answers, OSS would then fill in the scantron bubble on the test answer form and give it to the professor).

The "Classroom Accommodations" section of the Academic Accommodations Authorization from has a list of potential accommodations, under which is a subcategory, "Note taking assistance." Under that subcategory are the options of "Instructor Notes," "Classmate Notes," and "Tape Record Lecture." Beginning in fall 2013, appellant received the accommodation of tape recording lectures. He also received the assistive technology of a "Spell checker/language device" and preferential seating in the front of the classroom.

At trial appellant complained that OSS did not provide note takers to him until 2016, but he conceded that it was not until February 2016, after he filed the instant law suit, that he first requested a note taker from OSS.

In spring 2014, appellant took Music 111, in which he received a B. He received the same accommodations as in fall 2013.

Obviously, because appellant failed to present any evidence that the accommodations he received in fall 2013 and spring 2014 were inadequate, there is no evidentiary dispute that LACC provided reasonable accommodations for those semesters.

2. *Fall 2014 Classes*

The fall 2014 semester is the first semester as to which appellant contended that he was not granted reasonable accommodations.

That semester he took Physical Geography 1 and English 28, and the related laboratory components. He received the same accommodations as in fall 2013 and spring 2014, with the added accommodation of a "Victor reader" to record and read audio books.

A friend told appellant that he could request a note taker from the California Department of Rehabilitation (DOR). Appellant then contacted an OSS proctor at LACC (Leshawn Davis) and asked her if she was available. She said she was, and appellant forwarded her information to his counselor at DOR. He requested a note taker only for his Physical Geography I lab. After some resistance from his DOR counselor, Leshawn Davis became his paid note taker. He received a B in Geography 1 and an A in the related lab.

The English 28 lab required 16 hours at a writing center, where tutors were available. To work with a tutor in the lab, appellant explained that he would have the tutor read his paper from the computer screen and then make suggestions out loud. However, because no talking was allowed in the computer area of the writing center, appellant was unable to complete the hours at the lab. He was therefore required to complete his hours at the OSS office. He complained that there were no tutors available there on a walk-in basis. He conceded, however, that tutors were available there by appointment, but he chose not to take advantage of that accommodation. He received

an A in English 28; the lab was pass-fail, and he received a "P" (passing).

This evidence fails to meet appellant's burden of making a prima facie case that LACC failed to provided any reasonable accommodation that would enable him to meet the education requirements of his classes, and receive their educational benefits. (*Wong, supra,* 192 F.3d at pp. 816–817.) To the extent he contends that he did not have the assistance of a tutor for the English 28 lab, LACC offered a reasonable accommodation (an appointment with a tutor at the OSS office), but appellant chose not to take advantage of that accommodation, and (even without a tutor) he passed the lab.

To the extent he contends that LACC should have provided a note taker for the Geography 1 class (as opposed to the related lab, for which he asked and received a DOR paid note taker) and for the English 28 class and lab, the claim fails for several reasons. First, he presented no evidence that he informed OSS he wanted a note taker. (*Wynne, supra,* 976 F.2d at p. 795.) Second, at trial, he made no showing of need for a note taker, and his grades reflect no such need. (*Ibid.)* Third, although he contended that he did not know he could ask OSS for a note taker, the trial court could reasonably disbelieve that testimony in light of other evidence. The "Note taking assistance" section of the Academic Accommodations Authorization form listed the options of "Instructor Notes" and "Classmate Notes" (the latter referring to volunteer student note takers). Appellant testified that his OSS counselor read the form to him, but not in its entirety. Apparently, because appellant claimed he did not know that OSS would provide note takers until he filed this

lawsuit in 2016, appellant implicitly contended that his OSS counselor never read the portion of the authorization form describing the note taking options. However, appellant admitted he learned that DOR provided note takers—significantly, paid note takers, not voluntary student note takers—and the person he chose and received as a note taker, paid by DOR, was an OSS proctor. On this record, drawing all inferences in favor of the judgment, the trial court could reasonably disbelieve appellant's testimony that he was never informed of the note taking assistance options on the authorization form. Rather, the court could reasonably infer that appellant knew that volunteer note takers were available from OSS, but he did not ask because, as he contended at trial, he wanted a paid note taker, and did not want a volunteer note taker.

3. *Spring 2015 Classes*

In spring 2015, appellant took a writing class, English 101, and Health 2. He received the same accommodations as in fall 2014.

According to appellant, in English 101 the professor used handouts in class that he was unable to read, so he had to take them to them to OSS, which converted them into a form he could use on his Braille machine. Appellant complained that he was unable to follow the class while the teacher discussed the handouts because he had to wait for OSS to send him a file that he could use on his Braille machine, or he was unable to keep up with the professor because his Braille machine read only one line at a time. Appellant stopped attending class

after becoming ill and received an "F". He repeated the course in fall 2016 and received an A.

As for Health 2, the class consisted of lectures in part, and also required the use of exercise machines. According to appellant, the equipment did not have instructions in Braille, and the instructor did not teach him how to use the machines. Rather, appellant relied on a friend to help him. He stopped attending because of health issues, not a failure to accommodate. When appellant attempted to retake the class, the instructor told him he would need a personal attendant to help him with the equipment, but appellant did not request an attendant from OSS and instead dropped the class again.

Nothing in this evidence discloses a failure by LACC to reasonably accommodate appellant. For the handouts in English 101, LACC provided a reasonable accommodation (converting the handouts to a Braille accessible form), and appellant fails to demonstrate that some specific, other reasonable accommodation was available to alleviate that problem. (See *Memmer, supra,* 169 F.3d at p. 633 [plaintiff has the burden of establishing the existence of specific reasonable accommodations that were not provided].) There is no evidence that appellant requested a note taker. As for Health 2, there was no evidence that he requested an accommodation to help him use the exercise machines. Significantly, he discontinued both classes not because of any failure to accommodate, but because his health required him to withdraw. There is clearly insufficient evidence to prove a failure to accommodate for appellant's classes in spring 2015.

4. *Fall 2015 Classes*

In fall 2015, appellant took Humanities 30 and Sociology 001. He received the same accommodations as in prior semesters, with the addition of "e-text" (the significance of which is not explained in the record). He achieved an A in both classes.

As for Humanities 30, appellant had a list of complaints. He received a book voucher approximately two weeks before school began, but he did not redeem it at OSS until immediately before class started. Appellant asked if OSS could immediately provide him with whatever book they had on hand, and OSS complied, providing him with an audio textbook. But appellant found the book inadequate because he could not search for words or learn the spelling of words, which he needed to complete his assignments. He then requested a digital textbook from OSS. OSS attempted to comply with his request, and scanned portions of the textbook at a time throughout the semester. Appellant found that accommodation inadequate because he did not receive the files in a timely manner. However, he did not suggest some further accommodation that was available.

He also complained that he was unable to use a database for research recommended by the professor for a research assignment because his screen reading program did not work on the database. Therefore, appellant asked the technology center at OSS for help converting the files. OSS attempted to comply, but according to appellant, the conversions were full of errors. Nonetheless, appellant did not inform OSS of that deficiency so that it could be corrected if possible.

Far from demonstrating any failure by LACC to reasonably accommodate appellant, this record demonstrates a conscientious attempt by LACC to provide reasonable accommodations to help appellant in his humanities class, and, with respect to the claimed inadequacy of converting the research database, a failure by appellant to inform OSS of the problem. In light of the accommodations given, and the fact that appellant received an A in the class, the trial court reasonably concluded that appellant failed to prove a failure of accommodation by LACC that deprived appellant of the educational opportunities available in the class.

As for the fall 2015 sociology class, appellant received an audio textbook and a digital textbook. He used a Braille machine to take notes, but was unable to take notes of items the professor wrote on the board in class. He testified that a note taker would have helped him, but he did not request one from OSS. Thus, as to the sociology class, there is evidence of reasonable accommodations provided by LACC, and insufficient evidence of a failure by LACC to meet any request by appellant for additional accommodations.

5. *Spring 2016 Classes*

In spring 2016, appellant took Communications 121 and English 101. He received the same accommodations as in fall 2015. His complaints centered on the failure to provide note takers, lack of access to assignments, and test taking. We discuss each category in turn.

a. *Note Takers*

Appellant testified that he asked OSS for note takers for both classes (this was the first time he did so). That testimony is supported by an email he sent to OSS on March 8, 2016. In that email, he wrote: "I want to confirm my request to you for a new note taker/reader for my classes. As I told you today, the note taker assigned to me, Karen Romero, left. I have no way to follow along with other students when the instructors write on the board, or use written materials I have not been given previously in an accessible format. OSS didn't offer to get me a new note taker, but instead offered me a smart pen. A smart pen is not a solution to my inability to see what takes place in class and be able to keep up. I can't see what the instructor is doing on the board, or what material she may be using. This means I have a difficult time participating in class. I feel unsure of what is taking place. [¶] You also suggested that I make an announcement in class for a fellow student to help me. As a disabled person, I do not want to ask fellow students to do me a favor, and have pity on me. This suggestion makes me stand out. A fellow-student may not want to read to me out loud what is on the board, or give me notes, when he should be concentrating on his own work. This lack of accommodation is making it harder for me to succeed in class. I want to do the best I can do with my abilities, and not have to try and convince other students to help me. [¶] Please accept this as another request for a note taker/reader that will be in class with me, and take notes and read information I cannot see in class. Please provide me a note taker for my two classes English 101 and Communications 121. If you are not willing to give me a note

taker, please write me an email and tell me how I can keep up in my classes when I cannot see what is being taught."

In his email, appellant referred to Karen Romero as his assigned note taker, and stated that she left. Romero was a paid note taker with DOR, and was not associated with LACC.[5] Insofar as appellant was requesting someone to replace her, he was apparently referring to a paid note taker. Indeed, appellant testified that he told OSS that he preferred a paid note taker, rather than a student volunteer. Appellant testified that he did not remember clearly, but he thought OSS told him there was no funding for a paid note taker.

On March 9, 2016, Randy Anderson, Dean of Student Services—Special Programs, responded to appellant's email. He explained that Romero was not an LACC employee for whom LACC was responsible. He also explained the procedure for obtaining a volunteer note taker, and specifically advised that appellant was not expected to ask other students to be note takers.

Anderson wrote: "I am responding to your email . . . . Please understand that Ms. Romero is an employee of the Department of Rehabilitation and is in no way associated with LACC other than to provide note taking services for some of their clients. This is an issue Mr. Turner [appellant's counselor in the Office of Special Services] can

---

[5] According to Romero's trial testimony, she was not appellant's assigned DOR note taker. Rather, she testified that appellant asked her to provide notes for him. However, her schedule was already full with four other students, and thus she was not able to do it for him.

assist you with by working with your Rehabilitation Counselor but you should also contact your Rehabilitation Counselor regarding your request to them for services through their offices. [¶] Regarding the process for obtaining a volunteer note taker in OSS, the first step . . . is for you to approach your instructor(s) to make a confidential request to the class, we do not recommend that you make the request to the class. If you are uncomfortable making the request to your instructor(s) then your OSS counselor will contact the instructor or even the department chair on your behalf. This process has been very successful in the past, since the volunteer note taker is also engaged in learning the same material for your class. The OSS volunteer note taker is allowed to bring the written notes to OSS or send them electronically and we will provide copies to you. (This procedure is listed on the LACC-OSS Webpage under Accommodations). [¶] I have been told that your OSS counselor has contacted your two instructors and they have both responded positively so hopefully we will have identified volunteer note takers soon. . . . Counselor Turner is also contacting your instructors to remind them to read out loud whatever they are writing on the board. If this continues to be an issue, please let your Counselor know and we will contact either the department Chair or the Dean on your behalf." (Emph. in orig.)

With respect to English 101, appellant testified that he did not receive a note taker. But there is no further evidence in the record concerning his need for a note taker in English 101. It must be remembered that he was able to make audio recordings of the class, and at trial he testified that his need for a note taker was based solely on

instructors writing on the board in class or using handouts he could not read. He made no showing that his English 101 professor did these things, or that the professor failed to comply with the direction (referred to in Anderson's March 9, 2016 email) to read out loud anything written on the board. Further, appellant received an A in the class, a clear indication that the accommodations he received were reasonable and adequate.

As to Communications 121, appellant testified that he received a voluntary student note taker named John. John would give appellant his notes from class, and appellant would take them to OSS to have them converted to a digital file for appellant. However, at some point John stopped providing notes.

In support of this testimony, appellant introduced an email he sent to OSS on May 2, 2016 concerning the absence of a note taker from Communications 121. He wrote: "I wanted to inform you that my student note taker for Communications 121 . . . was absent on Thursday and that same class meets tomorrow. What should I do in this situation in terms of getting notes when the note taker is not consistent in his attendance?"

Appellant testified that he did not remember if he received a response. However, as he had been told in the earlier March 9, 2016 email from Anderson, he knew that the LACC protocol was for him to ask the professor confidentially to solicit a student note taker, and if the professor was unable to find one, OSS would try to obtain one. There was no evidence that appellant followed the protocol and asked the Communications 121 professor to find another note taker. He testified

that he did not know if OSS tried to find another note taker.[6] He also testified that he wanted a note taker to read what the Communications professor wrote on the board. However, there was no evidence that that professor did write on the board: appellant testified that he "couldn't know" whether the professor actually wrote on the board, was "not sure" whether she used a power point presentation, and could not remember whether she handed out material in class that he could not read.

This evidence does not meet appellant's burden of proving that LACC failed to provide reasonable accommodations with respect to note takers. First, although appellant testified that he did not receive a note taker for English 101, he presented no evidence explaining his need for a note taker, and he received an A in the class. Second, LACC provided a voluntary student note taker for Communications 121. Apparently, at some unspecified time, that note taker stopped providing notes. LACC protocol required appellant to ask the professor to make a confidential request of the students in the class for a volunteer note taker. There was no evidence that appellant followed that protocol and was unable to

---

[6] In his trial testimony, appellant testified that when he requested a new note taker from OSS, he was instead offered a smart pen. Because a smart pen would not accommodate the issues of being unable to see what the professor wrote on the board and being unable to read written handouts, and because it required him to handwrite instead of use Braille, appellant declined the pen. However, this testimony is contradicted by the emails and other evidence. His email of March 8, 2016, referred to the offer of a smart pen. But Anderson's email of March 9, 2016, offered voluntary note takers (not a smart pen), and by appellant's own testimony he later received a note taker for Communications 121 (John).

obtain another note taker, or evidence that OSS failed to try to find another student note taker. Third, appellant was able to record lectures. His request for a note taker in Communications 121 was premised on the possibility that the instructor would use material such as handouts in class that appellant could not see. However, appellant presented no evidence that such a situation occurred. He testified that he "couldn't know" whether the professor actually wrote on the board, was "not sure" whether she used a power point presentation, and could not remember whether she handed out material in class that he could not read.

Finally, to the extent appellant wanted OSS to provide a paid note taker, his personal opinion that a paid note taker was better than voluntary student note takers[7] was not a basis to conclude that such an accommodation was necessary for him to enjoy the educational benefits of his classes. LACC was not required to provide every accommodation appellant requested or the accommodation of his choice. (*Dean, supra,* 804 F.3d at pp. 186–187; see *Argenyi, supra,* 703 F.3d at p. 448 [only necessary auxiliary aids and services need be provided].)

---

[7] He testified that he wanted a paid note taker because the paid note taker always showed up for class. Also, student note takers were distracted by trying to focus on their own learning and class participation.

b. *Assignments*

Appellant's Communications 121 class required the students to create a video log, journals, and a partnership presentation. Appellant was able to complete the assignments, and there was no evidence that he requested an accommodation.

Appellant was unable to access the website of the Communications 121 professor, where she posted all the assignments, because it was not formatted for his screen reader. The OSS office informed appellant that once the web site was created for the semester, the professor could not change it.

To accommodate appellant in receiving assignments, Ryan Kushner, the main assistant at the OSS technology office, downloaded the assignment files from the website to appellant's USB drive to allow appellant to access them. Toward the end of the semester, the professor sent appellant an email telling him that changes had been made to the assignments, and explaining the changes. Appellant testified that Ryan Kushner did not provide him with updated assignment files, but there was no evidence that he requested Kushner to do so. Rather, appellant testified that his mother helped him: she viewed the website, and relayed the assignment information to him.

According to appellant, the final project was that each student was to be interviewed by someone he or she knew. The professor added a portion of the assignment to require the student to submit a photograph of the interviewer and have the interviewer sign the written interview. Appellant testified that he could not see well enough to take a photograph, and that he learned of the assignment change too late to

be able to submit a photograph and have the interview signed. Appellant testified that he "believe[d he] might have" informed the professor that he had not been able to complete the last portion of the assignment because he learned of it too late. But there was no evidence that he ever requested an accommodation from OSS or the professor to allow him to complete the assignment.

Appellant also complained that he was not able to obtain extra credit by completing the "optional gratitude assignment" (that assignment is not explained), because it required him to watch a video. But there was no evidence that he sought any type of accommodation to allow him to complete the assignment.

This evidence supports the trial court's conclusion that appellant failed to meet his burden of making a prima facie showing of a failure to reasonably accommodate. Appellant completed the video log, journals, and partnership presentation assignments, and made no showing that additional accommodations were required for those assignments. LACC provided a reasonable accommodation given the inability to change the professor's website to make it accessible to appellant: downloading the assignment files from the website to appellant's USB drive to allow appellant to access them. When the professor informed appellant that there were additions to some of the assignments, appellant did not ask OSS for help, and instead relied on his mother to view the changes and read them to him. There was only one assignment about which appellant complained: he was unable to complete the interview project with a photograph and signature. But there is no evidence that he informed OSS of his difficulty, or asked the professor or OSS for some

type of accommodation to allow him to complete it. Viewing the reasonableness of LACC's accommodations in light of what it reasonably knew about his needs (*Wynne, supra,* 976 F.2d at p. 795), the evidence supports the conclusion that the absence of some type of accommodation for the interview assignment does not meet appellant's burden of proving a failure to reasonably accommodate.

c. *Test Taking*

In Communications 121, the final exam was a take home exam. The professor emailed the exam to OSS, and appellant received a printed copy from OSS. However, appellant informed OSS and the professor that he could not complete the exam as printed. Therefore, OSS downloaded it to appellant's USB and appellant completed the exam on his computer at home over the weekend as did the other students. After completing the exam, appellant gave his USB drive to the OSS office to be downloaded. Someone at OSS was to fill in the scantron answers for appellant and send them to the professor.

According to appellant, OSS lost his test. It remained lost for about eight months before it was found and given to the professor. After the exam was found, appellant's grade was changed from a D to a C.

To the extent appellant contends that LACC did not provide a reasonable accommodation for his test in Communications 121, he is mistaken. The scantron assistance was a reasonable accommodation. That the exam was lost may have been negligent, but the exam was ultimately found, appellant's answers recorded, and appellant's grade in

the class was changed from a D to a C. LACC acted reasonably, and appellant fails to demonstrate what LACC could have done under the circumstances except to search for the test, and find it.

6. *Fall 2016 Classes*

According to his transcript, appellant took English 103 and Sociology 2 in fall 2016. He received A's in both classes.

As to the English 103 class, appellant had a problem when the professor showed videos in class, but the professor narrated the videos as he played them, which appellant testified assisted him. He did not suggest that this accommodation was insufficient.

As to Sociology 2, appellant had a problem because an employee at the bookstore selected the wrong textbook from the class receipt appellant gave him—it had the same title as the assigned book, but a different author. Appellant took the book to OSS to be converted to a digital format. Appellant discovered that the professor's assignments did not correspond to the book, and suspected something was wrong, but he did not tell OSS and it took him a while to ask a sighted friend to check the book. At that point, he obtained an audio version of the book, and he did not tell OSS that he had the wrong book because it was close to final exams and he thought the audio book would be sufficient.

This evidence does not disclose a failure to reasonably accommodate. Appellant's only real complaint was that he had problems with the text book in Sociology 2. But that was not due to a failure in attempting to provide reasonable accommodations. When appellant learned that the bookstore employee had made a mistake

(right book title, wrong author), he did not ask OSS for any accommodation, and obtained an audio copy of the book himself. Further, he received an A in the class. On this evidence, there was no failure by LACC to reasonably accommodate appellant.

7. *Spring 2017 Classes*

At the time of trial, appellant was taking Psychology 1 and History 13. He received volunteer note takers for both classes.

In History 13, the note taker failed to come to class two or three times. Appellant testified that on those occasions he could not get notes from anyone else, because when class ended students hurried out of class and it was hard to know who took notes and who did not. Nonetheless, appellant described the note taker for Psychology 1 as "mostly" consistent. He also conceded that both note takers provided notes that were effective in allowing him to review the material presented at lectures.

The note takers did not read material printed on the board. Rather, at appellant's request, the professors would read the material . Eventually he received a reader in Psychology 1. He requested a reader for History, but had not received one by the time of trial. Nonetheless, he conceded that for both classes, he was receiving accommodations.

Based on appellant's own testimony, there was simply no evidence of a failure by LACC to reasonably accommodate him in spring 2017: the note takers provided effective notes, he could record lectures, the professors would read any material they wrote on the board, and appellant conceded that he was being accommodated.

8. *Conclusion*

Having exhaustively reviewed appellant's evidence relating to classroom accommodations, we conclude that the evidence supports the trial court's determination that appellant failed to meet his burden of making a prima facie showing of a failure by LACC to reasonably accommodate him. We do not make light of the challenges appellant faced, the problems he encountered, or the effort he expended in attending and completing all of his classed but two (which he dropped for health reasons). But viewed under the standard applicable on appeal, the trial court's factual findings (whether express or implied) are supported by the evidence, and those findings support the conclusion that appellant failed to make a prima facie showing of a failure to accommodate under the ADA, Rehabilitation Act, and the Unruh Act.

D. *Emergency Procedures and Physical Barriers*

Appellant contends that he was denied reasonable accommodations concerning emergency procedures and physical barriers. We conclude the evidence supports the trial court's finding that there was not a failure of accommodation.

Appellant testified that he had never received information from OSS about emergency procedures or drills. He was unable to access emergency policies or the emergency map on the school's website because his screen reader did not adequately work on the website. He also was unable to sign up for emergency text notifications on the

website. LACC's emergency protocol for disabled students was to have the student find a "buddy" to help escape the area. Appellant had experienced one emergency drill at LACC. During that drill, the professor helped him evacuate and return to class.

As for physical barriers, when appellant started attending LACC, he went to the Braille Institute, located next to LACC, to ask for help navigating the LACC campus. He signed up for the Braille Institute's orientation and mobility instruction, but he waited about a month for someone to help him find his classes and write his route on his Braille machine. Appellant did not receive directional assistance from any LACC staff member.

Appellant testified that there were many construction areas at LACC that blocked accessibility and created hazards for him, such as tools, construction cones, sandbags, and fences. He had tripped over and crashed into various unexpected obstacles at LACC. He also had had difficulty on some staircases where students were sitting.

Karl Danz, an expert witness regarding disability access, testified that he inspected LACC with appellant in December 2016. He identified various barriers and other hazards that could pose a danger to someone with visual impairment, such as uneven sidewalks and lack of handrails on stairs.

As with appellant's evidence of his classroom experience, we do not make light of the challenges and difficulties appellant faced, but the evidence supports a finding that he failed to prove a failure to reasonably accommodate.

It is true that LACC was aware of appellant's disability, and was aware of his need for accommodations in his classes, which it provided. But although appellant presented evidence that he was unable to access emergency information on the school's website and was unable to sign up for emergency text notifications, he presented no evidence that he asked the school to address these issues. Similarly, there was no evidence he requested accommodations regarding barriers such as uneven sidewalks and lack of handrails on stairs that he encountered.[8] "A public entity must provide a reasonable accommodation under the ADA when it knows that the individual is disabled and 'requires an accommodation of some kind to participate in or receive the benefits of its services.' [Citation.] '[A] public entity is on notice that an individual

---

[8] Appellant contends the trial court erroneously limited his evidence to physical barriers he personally experienced. His contentions are unmeritorious. Appellant challenges the exclusion of his proposed injunction, entitled "Demand for modification of policies and practices," which does not constitute evidence of barriers. He also challenges the exclusion of a report by Danz, which he contends "validated [his] experiences" and identified barriers other blind individuals might encounter. The exclusions appellant cites do not address the lack of evidence that he made the school aware of his need for accommodations regarding these barriers.

At oral argument, appellant's counsel asserted that the trial court also erroneously excluded testimony by Romero, stating that she raised this evidentiary challenge in her brief. However, she raised the issue only in a footnote in her recitation of the facts and did not make any legal argument. The issue accordingly is forfeited. (See *Garcia v. Seacon Logix, Inc.* (2015) 238 Cal.App.4th 1476, 1489 [""An appellate brief 'should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as [forfeited], and pass it without consideration.""].)

needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation.' [Citation.]" (*J.V. v. Albuquerque Public Schools* (10th Cir. 2016) 813 F.3d 1289, 1299.) Here, viewing the evidence in the light most favorable to the judgment, appellant did not request an accommodation, and it is not clear that the needs for accommodation were so obvious that LACC should be charged with notice of them. (See also *Green v. Tri-County Metropolitan Transp. District of Oregon* (D. Or. 2012) 909 F.Supp.2d 1211, 1219 ["under the ADA a plaintiff is required to identify specific, reasonable accommodations that a defendant failed to provide"]; *Rey v. Univ. of Pittsburgh Sch. of Dental Medicine* (W.D.Pa. 2016) 182 F.Supp.3d 282, 297 ["[A] defendant 'cannot be found to have violated the ADA or the Rehabilitation Act for failing to grant an accommodation to [a] plaintiff based on an alleged disability of which it had no knowledge, nor any reason to know, while plaintiff was enrolled in [its institution]. [Citation.] 'A relevant aspect of this inquiry is whether the student ever put the . . . school on notice of his handicap by making "a sufficiently direct and specific request for special accommodations."' [Citation.]"]; 1 Americans with Disabilities: Practice & Compliance Manual (November 2018 Update), § 2:93 ["A public entity must know what a plaintiff seeks prior to incurring liability for failing to affirmatively grant a reasonable accommodation, and public entities are not required to guess at what accommodations they should provide"].)

Thus, appellant did not meet his burden under the ADA, Rehabilitation Act, and Unruh Act regarding his claims relating to the emergency plan and architectural barriers.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

DUNNING, J.*

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.